HARVARD

LAW REVIEW.

VOL. XVI. MARCH, 1903. NO. 5

WHAT IS A PROMISE IN LAW?

IT has been said[1] by a thoughtful and instructive writer that "a contract may be well enough defined as an agreement to which the law annexes an obligation."

The approval or rejection of this concise definition would seem to indicate a radical difference in the conception of a promise, and its adoption by the present writer appears to have involved him in a friendly controversy with at least two of Professor Langdell's colleagues on the Harvard Law Faculty. This article is an attempt to state the writer's position more fully than could be done in an oral discussion.

It is believed that "promise" in law is the equivalent of "contract." When a lawyer speaks of "promise," he surely is not using the word in a lay sense. It is not conceivable to me that the term "promise" as a legal idea can mean anything except words of promise to which the law annexes an obligation. When we speak of a unilateral contract, we mean a promise in exchange for which an act or something beside another promise has been given as consideration. We there clearly have in mind the idea of promise as something binding. Words of promise are considered as an offer merely, unless they have ripened into a legal obligation. Viewed from any standpoint, the legal idea of promise seems to come back to something binding, something to which the

[1] A Brief Survey of Equity Jurisdiction, 1 HARV. L. REV. 56, note 1.

law annexes an obligation, and if this is so, promise and contract do not differ as terms, for a promise is a contract. It is true that one may accept Professor Langdell's definition and yet not agree that promise is equivalent to contract, and it may be argued that therefore it by no means follows that a promise is something to which the law attaches an obligation. At any rate, a radical difference of view seems to exist as to what is meant by this term "promise," and this difference leads to the argument that the law may well recognize mere words of promise as equivalent to the legal term "promise"; in other words, that the lay and the juristic use of the term "promise" are identical.

But to go further back for a moment, let us consider how we are to determine whether any given state of facts is such that we can say it conforms to a legal conception. When we say that a contract exists because we have an agreement to which the law annexes consequences, it may be replied that this is vicious reasoning in that the very question under dispute is whether the law will or will not annex its consequences to this very agreement, and that to say the law will do so in any case begs the question in dispute. This would be true if it should be argued that a given agreement is a contract *because* the law annexes consequences, but such is not the position which should be taken.

Professor Williston,[1] referring to Anson's criticism of the above method of reasoning to the effect that it is practically arguing in a circle, says: ". . . but it has not been always observed that the same criticism may be made in the case of every bilateral contract if the test of the sufficiency of consideration is defined, as it usually is, as a benefit conferred upon the promisor or a detriment suffered by the promisee. To enter into a binding obligation to do or not to do anything whatever is always a detriment, and on the other hand, unless a promise imposes an obligation, no promise whatever can be considered a detriment. It is, therefore, assuming the point in issue to say a promise is a detriment because it is binding."

Professor Williston wrote as a lawyer and from the legal standpoint; consequently it seems evident that his terms are used professionally, and that the word "promise" is employed in a legal sense.

This argument, therefore, assumes that there may be a promise in law which does not impose a legal obligation.

---

[1] 8 HARV. L. REV. 35.

But if a promise in law is always equivalent to obligation, as is here contended, there is no begging the question in Professor Williston's illustration. If my contention is correct, as a promise in law is always a "binding obligation," and such obligation is always a "detriment," the conclusion necessarily follows that a promise may always constitute a consideration, and the question in any given case is whether a promise can be found.

The lawyer answers this question by the exercise of his professional training, and says this is an agreement of such a character that the law should, on principle, annex its consequences thereto, and therefore it ought to be held a contract. When we examine a proposed bilateral contract to determine whether the parties have succeeded in their attempt, we should look at each supposed promise with a view to its legal requirements, and we may then conclude that each is a promise if it meets our professional conception of what a promise should be. There is no begging the question in such a process. It is true that in reaching our conclusion we must examine the proposed promises in every detail, and one point among others will necessarily be to ascertain just what is imported by the proposed words of promise.

To establish, then, that in any given case we have a "promise" in law, we must employ our legal acumen, and if at the close of our argument another lawyer remains unconvinced it must be left as a mooted point.[1]

The above suggestion of Professor Williston meets the approval of Dean Ames,[2] who then asks, "Is not the alleged question-begging in this case, and indeed in all cases of mutual promises, purely imaginary?" Not, as he proceeds to explain, because he conceives there is any flaw in Professor Williston's position, but because he takes another view of a bilateral contract, which he states as follows: "Everyone will concede that the consideration for every promise must be some act or forbearance given in exchange for the promise. The act of each promisee in the case of mutual promises is obviously the giving of his own promise *animo contrahendi* in exchange for the similar promise of the other. And this is all that either party gives to the other. This, then, must be the consideration for each promise; and it is ample on either of the two theories of consideration under discussion. For

[1] See the argument of Professor Langdell upon this point in 14 HARV. L. REV. 503 *et seq.*

[2] 13 HARV. L. REV. 31.

the giving of the promise is not only an act, but an act that neither was under any obligation to give. This simple analysis of the transaction of mutual promises is free from arbitrary assumptions and from all reasoning in a circle. The supposed difficulty in this class of cases springs from the assumption that the consideration in a bilateral contract is the legal obligation, as distinguished from the promise, of each party. But this is to overlook the difference between the act of a party and the legal result of the act. The party does the act, the law imposes the obligation. Suppose, for example, that X promises to pay A a certain amount of money in consideration of A's signing, sealing, and delivering, *animo contrahendi*, a writing containing a promise by A to convey a certain tract of land to X, and that A does sign, seal, and deliver the written promise accordingly. X is unquestionably bound by this acceptance of his offer. A, however, has done nothing beyond the performance of certain formal acts. These acts alone must form the consideration of X's promise. Indeed X by the express terms of his offer stipulated for precisely that consideration. He was willing to do so, of course, because the performance of those acts would bring A within the rule of law which imposes an obligation upon any one who executes a sealed promise. Precisely the same reasoning applies in the case of mutual promises. Each party is content to have the promise of the other given *animo contrahendi*, because each is thereby brought within the rule of law which imposes an obligation upon any one who has received what he bargained for in return for his promise."

It is first to be observed in reference to the above statement that "the act or forbearance given in exchange for the promise" to constitute "consideration" must be the act or forbearance asked for by the proposed promisor. Consequently, in bilateral contracts, the giving of a promise, *animo contrahendi*, is only sufficient when it is the promise asked for, and if a person has asked for an obligation, then mere words of promise to which no legal consequences can attach, do not furnish the promise desired by the other party and he has not received "what he bargained for in return for his promise."[1]

It is very true, as Dean Ames says, that the parties do the act and the law annexes the consequences, but my contention is that

[1] Of course one may ask that another repeat an idle formula such as "I promise" in exchange for a promise, and upon such act taking place a unilateral contract arises. The discussion has no reference to such a case.

when one asks for a promise as a consideration he asks for words of promise of such a character that the law will annex consequences, and unless they are of such a character the consideration asked for has not been furnished.

Dean Ames's view seems to amount practically to this, that in reality a bilateral contract is the same as a unilateral, except that in the bilateral contract the act given as consideration consists of words of promise, without any regard to whether the law will annex consequences or not.

This suggestion would seem to indicate that by promise in law we do not necessarily mean anything more than a formula of words. But what is a promise if it obligates to nothing? Words of promise are a mere offer until they ripen into a promise, but then they change and cannot thereafter be withdrawn. If the promise is not to give or do something, what does it mean when we say it cannot be withdrawn; what is it but a mere nothing? Can that be a promise in law which binds to nothing, which really means nothing? Can we fairly say that in Dean Ames's illustration given above X asks simply for the formal act of signing, sealing, and delivering? Is it not evident that X does not ask for these acts, as such, in the supposed case, but that he does ask for an obligation under seal? He does not obtain what he requests because no obligation is given. Of course there might be instances in which the formal act alone is desired. Thus suppose the following case: A and B entered into a contract in writing for the sale of A's house in New York City to B. B's lawyer examined the title to the property, and objected thereto on the ground that one C, who owned the property many years before, conveyed without having his wife join in the deed to bar her dower right. C died years before, but A hunted up Mrs. C and requested her to execute a release of dower on the property which he had prepared and then presented to her. This she refused to do. A then promised to pay her $2,000 in consideration of her executing the said release of dower, and upon that promise she did so. It subsequently turned out that Mrs. C had no dower right in the premises, because C was unmarried when he conveyed the premises and did not marry until later.

There would be a contract in this case because A asked for an act, namely, executing the formal document presented, and the widow relinquished a right, which was to abstain from writing her name.

But suppose the request had been to release her dower and not the formal signing. How could the execution of the instrument in that case support A's promise, since she had no dower to release? How does the case differ when the consideration asked for is a promise under seal, and the executed instrument has no legal effect, in other words, carries no obligation? Does the proposed provision merely ask for the execution of the paper, hoping that legal consequences may follow? It seems fair to say that what A wants is the obligation.

After a careful study of various arguments advanced, I am unable to accept the view that except as an offer mere words of promise to which no legal consequences can attach may be considered as a legal conception.

Suppose that both A and B know that A's pocket is empty, will A's proposed promise to take nothing from said pocket be sufficient to support B's promise to pay $5? Surely A's so-called promise is nothing but an empty form of words to which no force can attach. What does A give up, or from what right does he pledge himself to abstain?

A consideration would seem to be something given by one person to another in exchange for that other person's promise. How can we say that A has given anything to B by such a proposed promise as that in the pocket case?

But if the writer has correctly understood Dean Ames both in his written views and his oral argument he maintains that A would give a promise in such a case, and that it would support the proposed counter promise.

This different conception of the legal import of promise leads to practical results in a class of cases which have been much discussed.

When a person is under obligation to do a certain thing, can he make the doing of that thing the consideration for a new promise, either from the party to whom he is under obligation, or from a third person? What does he give in exchange for the new promise? Take first the cases where the proposed promise is from the person to whom he is already obligated. In these cases it may be argued that convenience demands the recognition by law of the proposed new arrangement. But, on the contrary, by such recognition the courts would seem practically to sanction blackmail.

A, who is an experienced builder, contracts to erect your building for $50,000 and finish the work by May 1st. You know

nothing about building, but finding that you can advantageously put up the structure at that price, you sign the contract and make all your arrangements. Building materials increase in price, and your builder on February 1st refuses to complete unless you promise to pay $20,000 more. Non-completion of your building means ruin to you, and you choose the lesser evil and stand the loss of $20,000. In other words, although you only bring about what you are entitled to, the law is asked to tax you $20,000 for nothing. True, you need not promise, if you prefer ruin, but if you do use these words of promise you are bound, although nothing new is furnished and you receive only that for which you have already paid by your first promise. If we are to adhere to the settled doctrine that a promise must have a consideration, what do we find here which has been given in exchange for the promise?

It may be said that the man may otherwise break his promise. It is true that our procedure does not always adequately protect against a breach of promise, but certainly the courts do not sanction the breaking of promises, and no one doubts that in theory of law a promise should be kept, not broken. In cases where the promise is made by a third person, we do not have the encouragement of possible blackmail, but there is still the same difficulty that nothing is really furnished in exchange for the promise, there is nothing for the offeree to give. But does the case of a new proposed bilateral contract change the situation? If the offeree has no act to give, how can a proposed promise to give that act amount to anything?

Of course there may be cases in which the parties mutually agree to give up the existing contract and make a new one. To say, however, that there is any such consent in the illustration given above is to indulge in the purest fiction. The owner clearly does not consent to give up his existing rights.

There are classes of cases which may seem to conflict with this view. Thus in cases of compromise there is the settlement of a genuine dispute by a new bilateral contract. In such cases the claim on one side may have been without foundation, in which event the agreement to give up such unfounded claim does not in reality constitute a promise, because the claimant does not give up anything, as he proposes to promise to surrender a non-existing claim. That the law to-day sustains such compromise agreements is beyond question, and it is equally clear that such agreements cannot logically be maintained on the theory advanced above.

The answer is that such cases are exceptional, and should be sanctioned solely on the ground that public policy demands the exception. It is wise to quiet litigation, and on this ground the exception should be made, but it should be recognized clearly as an exception.

Again, as a general proposition, a man may commit a tort, but refraining therefrom will not and should not constitute a consideration. It is true that there are cases where the non-committing a tort is sufficient to sustain a promise, but it is observable that this occurs in cases which should never have been held to be torts, that is, where there is neither intent nor negligence — in other words, they are not, on principle, cases of tort. It is not every infringement of an absolute right which should on principle constitute a tort.

As the acts committed in this class of cases should not on principle constitute torts, this exception to the general rule of contract may well arise from the fact that it is an anomaly to treat the acts in question as torts. Public policy does not operate in such cases to prevent a contract from arising, as it does in the instances where tort should be found on principle. True, in these cases one in abstaining does not give up a legal right, but it is believed that the anomaly arises for the reason given above.

Thus, suppose a man invited to a Thanksgiving dinner promises, in consideration of a counter promise to pay him $100, that he will abstain from eating a much vaunted turkey to be furnished at the dinner. Suppose, unknown to the host, the turkey in question was wrongfully taken from a farmer. It would seem that eating the turkey would constitute a tort, and yet the agreement to abstain from eating would probably amount to a contract, because the act itself ought not to be considered a tort.

The cases of promises within the terms of the Statute of Frauds and the promises of infants and married women at common law are also exceptional. The Statute of Frauds furnishes an ordinary example of a change brought about by statute, from which no argument as to general rules can be drawn. But the so-called promises of infants and married women at common law should never have been held to be promises or to constitute a consideration for another promise. To so hold is, in my opinion, irreconcilable with principle.

In a recent review[1] a suggestion is made which raises an interesting question. The reviewer says: "The proposition that the

[1] 2 Colum. L. Rev. 61.

performance of, or the promise to perform, a contractual obligation, is no consideration for another promise, does not deprive any one, who wishes to secure a new promise to perform the same thing, of the power of doing so. If B in the case put wishes to secure a new promise from A that he will perform his contract with C, he can do so by giving, that is, delivering something to A as a consideration for such new promise, as, for example, five dollars, or a book. The passing of the title is a detriment to the person giving it, and is a good consideration for the new promise of A."

But does this suggestion help the situation? The correctness of the contention that under the circumstances named no second bilateral contract can be formed is assumed, and on that assumption the suggestion is made. Suppose, then, that A is under contract with C to do a specific thing, and that B, who is also desirous that A should do such specific thing, tries to contract with A, and that in exchange for A's proposed promise to do such thing B promises to pay him $5. If a contract does not arise, it must be because A being already under contract with C cannot make a new promise to do the same thing. If, then, A sues B upon the promise to pay him $5, B's defense is "no consideration," because A could not give the exchange promise asked; but if B sues A upon A's attempted promise, A cannot answer "no consideration," because B's promise to pay $5 may certainly constitute a consideration, but A's answer must be "no contract," because the law will not annex the consequences of contract to his own attempted promise. That is, the law will not recognize that A can promise under such circumstances. The difficulty lies in A's position, and the entire discussion turns upon that. If the law will annex the consequences of legal promise to A's mere words of promise, there is no difficulty, but if we concede that the law will not annex consequences to A's words of promise, how can such consequences arise by B's payment of $5? The law must still refuse to annex its consequences to A's words, and B has received nothing for his $5. The difficulty lies with the proposed promise of A, and not with B's promise. B's promise to pay $5 must be just as effective as the actual payment of $5, and the entire contention goes back to A's inability to promise at all under such circumstances. It would thus seem evident that the reviewer's suggestion does not meet the objection.

Suppose, to take an extreme case, that A being under contract to do a certain thing gives what, in form, is a promise under seal

to do that same thing. Could such instrument be enforced at common law? To be consistent, one must certainly answer "no." If we maintain that such words of promise are no consideration for an exchange promise, it is because they amount to nothing, because they cannot be an obligation. If that position is sound, it cannot change matters that the words are put under seal. How can either the sealed or unsealed words amount to anything? The proposed promisor has nothing to promise, as he has entirely disposed of his right to refrain from doing the supposed act.

In the various discussions arising on this subject consideration is looked upon from the standpoint of "detriment" to the promisee, and some effect seems to be given to this term in the argument.

Consideration is something furnished to the promisor in exchange for his promise. It need be neither a benefit to the promisor nor a detriment to the promisee, and it is only necessary that the promisee shall have furnished something sufficient in law which the promisor desired in exchange for his promise.

The best modern authorities agree that benefit to the promisee is not the test, but it is still generally stated that detriment is. The word "detriment" is not used in this connection in any technical sense, but has its usual meaning in the English language as indicating any kind of harm or injury. It is very clear that a detriment in the true sense is not essential, because the consideration furnished by the promisee is often a benefit to him and no injury. Thus, suppose a case where the man is on the verge of delirium tremens. A friend offers him $1,000 in consideration of his abstaining from alcoholic drink for six months. If he thus abstains he has furnished a consideration, and the promise to pay $1,000 certainly arises at the end of six months. Yet here the promisee has been benefited by the abstaining. It is true he has given up a right, but that very giving up saved his life and restored his health. To call that a "detriment" is the purest fiction, and inevitably tends toward confusion of thought.

Detriment to the promisee, then, is no more an accurate test of consideration to-day than is benefit to the promisor, and being now a fiction should be discarded.

Clarence D. Ashley.

NEW YORK UNIVERSITY.